

Mr. Mitchell, the Court and Wiretapping

Post 5/17/74

IN AN OPINION that was startling for its unanimity, the Supreme Court Monday in effect threw out more than 60 criminal cases against some 600 persons because the Justice Department under former Attorney General John Mitchell had failed to obey the simple strictures of the law. In addition, the court narrowly missed throwing out cases affecting 800 other defendants, sustaining them by a vote of 5 to 4.

Even in upholding the administration in this second case, however, the court took an uncharacteristic step. For while it found for the Justice Department it simultaneously criticized the department for flirting with lawlessness while supposedly administering justice. In sustaining the administration it took the occasion to remind it that "strict adherence by the government to the provisions [of a wiretap statute] would nonetheless be more in keeping with the responsibilities" Congress placed on the government when it authorized wiretapping. All in all, it was a poor day for a "law and order" administration, but only one of many bad days it has had of late, most of them brought about because it has demonstrably failed to practice what it preached.

The principal example this week came in the wiretapping case on which the court ruled against the government. Its ruling was an outright rebuke to the former attorney general. The law required that either the attorney general or a designated assistant attorney general approve of any wiretap request from a U.S. attorney. The reason was clear in the legislative history. Congress did not wish to hand over the power to request the use of this extraordinary method of investigation to a nameless, unaccountable bureaucrat; it wanted that power to reside with an official con-

firmed by and answerable to Congress, who could be called on to explain his actions. Despite that clear legislative intent, it became Mr. Mitchell's practice to allow his executive assistant to approve wiretap requests.

When Dominic N. Giordano of Baltimore was arrested on a charge of large scale dealing in heroin, he challenged the evidence accumulated against him on grounds that the wiretap thus obtained against him was not legally acquired. It was this contention which the Supreme Court upheld Monday, and the result was that 60 other cases were in effect thrown out.

The case in which Mr. Mitchell was criticized but upheld by the court presents a more complex set of facts in which there is some dispute as to whether it was Mr. Mitchell or one of his aides who authorized a set of wiretaps. There had been a suggestion in the lower courts that the Justice Department had not told all the truth about the matter, but the Supreme Court found for the administration. Had it not, cases involving 800 persons could have been dismissed.

It is impossible to be certain if this administration has encountered these difficulties because its leaders do not read the law or because they choose not to heed it. Ample evidence exists in support of both theses. But one thing is clear. Mr. Mitchell and this administration in general have demonstrated a lip service to the law that bears a diminishing resemblance to their actions. President Nixon once had occasion to refer to Mr. Mitchell as a "damn fine attorney general." When reading the opinion of the Supreme Court in these wiretapping cases, we are put to wondering why.